82-857

Office - Supreme Court, U.S.
FILED
NOV 22 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1982

GEORGE D. BUSBEE, *et al.*,
Appellants,

v.

WILLIAM FRENCH SMITH, *et al.*,
Appellees,

WILLIAM C. (BILLY) RANDALL, JR., *et al.*,
Appellee-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

CAROL ATHA COSGROVE
Senior Assistant
Attorney General
Counsel of Record for Appellants

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

MARK H. COHEN
Assistant Attorney General

JOSEPH W. DORN
Special Assistant
Attorney General
Counsel for Appellants

PLEASE SERVE:

CAROL ATHA COSGROVE
Senior Assistant
Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334
Telephone: (404) 656-3336

QUESTIONS PRESENTED

I. QUESTIONS PRESENTED BY THIS JURISDICTIONAL STATEMENT

A. Whether a Congressional reapportionment plan that has no discriminatory effect, that enhances black voting strength, and that provides blacks with equal access to the political process can be deemed to violate Section 5 of the Voting Rights Act.

B. Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.

II. QUESTION ALSO TO BE PRESENTED IF PROBABLE JURISDICTION IS NOTED

Whether the District Court's finding of discriminatory purpose must be set aside because it is based on an erroneous view of the controlling legal principles and on underlying factual findings that are clearly erroneous.

PARTIES

The parties to this Appeal are George D. Busbee, Governor of the State of Georgia; Zell Miller, Lieutenant Governor of the State of Georgia; Michael J. Bowers, Attorney General of the State of Georgia; Thomas B. Murphy, Speaker of the Georgia House of Representatives; and the State of Georgia, as Appellants; William French Smith, Attorney General of the United States; William Bradford Reynolds, Assistant Attorney General of the United States; and the United States of America, as Appellees; William C. (Billy) Randall, Jr.; J. E. (Billy) McKinney; Douglas Dean; Julian Bond; Horace Tate; Alveda King Beal; Lorenzo Benn; Tyrone Brooks; J. C. Daugherty, Sr.; Bob Holmes; David Scott; Hosea L. Williams; R. A. Dent; Calvin Smyre; Sanford D. Bishop, Jr.; David E. Lucas; Bobby L. Hill; John White; Raymond Brown; J. J. Jones; and Duane McMahon, as Appellee-Intervenors.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 5

SUBSTANTIALITY OF THE QUESTIONS PRESENTED 10

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT 10

A. The District Court's holding—that a reapportionment plan that does not have a discriminatory effect, that enhances black voting strength, and that does not deny blacks access to the political process can, nevertheless, violate Section 5 of the Voting Rights Act—is in direct and irreconcilable conflict with this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976) 10, 11

B. The District Court's holding—that a reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength can, nevertheless, have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act—is in direct and irreconcilable conflict with this Court's decision in *City of Richmond v. United States*, 422 U.S. 358 (1975) 16

TABLE OF CONTENTS (Continued)

Page

II. THE DISTRICT COURT'S FINDING OF DISCRIMINATORY PURPOSE SHOULD BE SET ASIDE BOTH BECAUSE IT IS BASED UPON AN ERRONEOUS VIEW OF THE CONTROLLING LEGAL PRINCIPLES AND ALSO BECAUSE IT IS BASED UPON UNDERLYING FACTUAL FINDINGS THAT ARE CLEARLY ERRONEOUS 23

III. THE ISSUES PRESENTED ARE SUBSTANTIAL 23

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page**

Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974)..... 10

Beer v. United States, 374 F.Supp. 363 (D.D.C. 1974)..... 13

Beer v. United States, 425 U.S. 130 (1976).....*passim*

Burns v. Richardson, 384 U.S. 73 (1966)..... 15

City of Mobile v. Bolden, 446 U.S. 55 (1980).....19, 25

City of Richmond v. United States, 422 U.S. 358 (1975).....*passim*

De Gaster v. Dillon, 247 F.Supp. 511 (D.D.C. 1963)..... 21

Fortson v. Dorsey, 379 U.S. 433 (1965)..... 15

Gomillion v. Lightfoot, 364 U.S. 339 (1960)..... 18

Mammoth Oil Co. v. United States, 275 U.S. 13 (1927)..... 21

Mississippi v. United States, 490 F.Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).....24, 26

Pullman-Standard v. Swint, ___ U.S. ___, 72 L.Ed.2d 66 (1982)..... 23

Rogers v. Lodge, ___ U.S. ___, 73 L.Ed.2d 1012 (1982)..... 25

Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974)..... 22

United Jewish Organizations v. Carey, 430 U.S. 144 (1977)..... 25

Washington v. Davis, 426 U.S. 229 (1976)..... 12

Wesberry v. Sanders, 376 U.S. 1 (1964)..... 6

Whitcomb v. Chavis, 403 U.S. 124 (1971).....15, 19, 24

White v. Register, 412 U.S. 755 (1973).....15, 19

TABLE OF AUTHORITIES (Continued)

Page

Statutes

28 C.F.R. § 51.44 9

28 U.S.C. § 1253 3

28 U.S.C. § 2201 2

28 U.S.C. § 2284 2,4

42 U.S.C. § 1973c (1975) 1,2,3

Articles

Bacote, *The Negro in Atlanta Politics*, 16 Atlanta U. Rev. (Phylon) 333 (1955) 20

Hornsby, *The Negro in Atlanta Politics, 1966-1973*, Atlanta Hist. Soc'y Bull. (Spring 1977) 20

Walker, *Negro Voting in Atlanta, 1953-1961*, 24 Atlanta U. Rev. (Phylon) 379 (1963) 20

NO. _____

IN THE

Supreme Court of the United States

October Term, 1982

GEORGE D. BUSBEE, *et al.*,
Appellants,

v.

WILLIAM FRENCH SMITH, *et al.*,
Appellees,

WILLIAM C. (BILLY) RANDALL, JR., *et al.*,
Appellee-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Appellants, George D. Busbee, Zell Miller, Michael J. Bowers, Thomas B. Murphy, and the State of Georgia, hereby appeal from the order and opinion of the United States District Court for the District of Columbia entered in this proceeding on July 22, 1982, and thereby bring to this Court important questions concerning Section 5 of the Voting Rights Act of 1965. 42 U.S.C. § 1973c (1975). Specifically, does Section 5 prohibit the legislative enactment of a Congressional redistricting plan that has no retrogressive effect on black voting strength, that in fact enhances black voting strength, and that does not have the purpose of diminishing the existing level of black

voting strength? More generally, does a State legislature's failure to maximize black voting strength evidence a purpose to deny or abridge the right to vote on account of race within the meaning of Section 5, where the legislature enacts an ameliorative electoral change? Never before has the Court reviewed a judicial denial of Section 5 preclearance where the electoral change at issue was found to enhance black voting strength. The resolution of these issues will affect every political subdivision covered by the Voting Rights Act of 1965.

OPINIONS BELOW

The opinion and order rendered by the United States District Court for the District of Columbia is not yet reported and appears as Part I of the Appendix hereto.

JURISDICTION

This appeal is taken from the July 22, 1982 order of a three-judge United States District Court for the District of Columbia denying Appellants a declaratory judgment that Georgia's 1981 Congressional reapportionment plan did not violate Section 5 of the Voting Rights Act of 1965. *See* Part I of the Appendix hereto. Federal jurisdiction was conferred by 42 U.S.C. § 1973c and 28 U.S.C. § 2201. The District Court was properly convened as a court of three judges under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

A Notice of Appeal was timely filed on July 26, 1982. *See* Part II of the Appendix hereto. A timely application for extension of time in which to docket the appeal was submitted to Honorable Warren E. Burger, Chief Justice of the Supreme Court and Circuit Justice for the District of Columbia Circuit, on September 3, 1982 and granted by order dated September 8, 1982. This Jurisdic-

tional Statement is being filed by November 23, 1982, the end of the time extension granted by Chief Justice Burger. *See* Rule 12 of this Court. The jurisdiction of this Honorable Court is invoked under 42 U.S.C. § 1973c and 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1973c (1975):

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such quali-

fication, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

STATEMENT OF THE CASE

On March 8, 1982, Appellants filed an action in the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act of 1965, seeking a declaratory judgment that Georgia's 1981 Congressional reapportionment plan (Act No. 5, 1981 Extraordinary Session, hereinafter referred to as "Act No. 5") was enacted without the purpose or effect of denying or abridging the right to vote on account of race.

The focus of the litigation was the reapportionment of Georgia's Fourth and Fifth Congressional Districts pursuant to the 1980 Census. It is undisputed that the manner in which Georgia's other eight Congressional districts were drawn complies with the Voting Rights Act. Appendix at p. 43a, ¶6 [hereinafter cited as "App., __a"].

Under the 1972 apportionment plan for Georgia's ten Congressional districts, which was based on the 1970 Census, the black percentage of population in the Fourth and Fifth Congressional Districts was 14.69% and 44.15%, respectively.[1] The 1980 Census indicated that the deviation from the ideal population and the black proportion of the population for the Fourth and Fifth Congressional Districts (as those districts were established in 1972), were as follows:

District	Total Population	% Deviation	Black Population	% Black
4	543,954	− .45	150,798	27.72
5	420,470	−23.05	211,634	50.33

App., 3a, ¶5. Based on the 1980 Census, the population deviation of the Fourth District did not require any ad-

[1] Although these figures were not referred to in the District Court's July 22, 1982 opinion, they were the subject of a pretrial stipulation by counsel for all parties in this action.

justment to meet the one person-one vote rule of this Court. *See Wesberry v. Sanders*, 376 U.S. 1 (1964). However, the population deviation of the Fifth District was −23.05%, *i.e.*, 23.05% below the population of the ideal district. App., 3a, ¶5. Thus, it was necessary to substantially increase the population of the Fifth District in order to bring it within the allowable deviation. *Wesberry v. Sanders, supra.*

In order to reapportion Georgia's Congressional districts, Appellant Busbee convoked a special session of the Georgia General Assembly, App., 2a, ¶2, which established that, after the State legislature had reapportioned itself, the State Senate would initiate a Congressional reapportionment bill before referral to the State House. As shown below, the plan passed by the Georgia Senate on August 31, 1981 (S.B. 2 Ex.) had the effect of enhancing black voting strength in the Fifth Congressional District, but it also caused a substantial reduction of the black percentage of population in the Fourth Congressional District:[2]

District	Total Population	% Deviation	Black Population	% Black
4	550,789	+ .80	21,564	3.94
5	550,389	+ .73	379,842	69.01

The enhancement of black voting strength in the Fifth District under the Senate plan was achieved at the expense of radically disrupting the preexisting configuration of that district and at the additional expense of diluting black voting strength in the neighboring Fourth District.

The plan passed by the Georgia House of Representatives on September 2, 1981 (House Substitute to S.B. 2 Ex.) also enhanced black voting strength in the Fifth

[2] *See* note 1, *supra.*

Congressional District but did not diminish black voting strength in the Fourth Congressional District. Statistical data for the Fourth and Fifth Congressional Districts under the House Plan are as follows:[3]

District	Total Population	% Deviation	Black Population	% Black
4	543,954	− .45	150,798	27.72
5	548,686	+ .41	283,874	51.74

The House Plan left the percentage of blacks in the Fourth District unchanged from the preexisting apportionment plan while increasing the black proportion of the Fifth District population from 50.33% to 51.74%. This was accomplished by making no change to the boundaries of the Fourth District and by extending the southern boundary of the preexisting Fifth District southward, keeping all of the Fifth District within Fulton County, as it had been under the 1972 apportionment plan.

Because the House and Senate did not agree on a reapportionment plan, both chambers appointed a conference committee to achieve a compromise between the two plans. After six conference committees, the Georgia General Assembly enacted Act No. 5, providing for the reapportionment of Georgia's ten Congressional districts. The statistical data for Act No. 5 demonstrate that it significantly enhanced black voting strength in the Fifth Congressional District, while, at the same time, maintaining an influential level of black voters in the Fourth Congressional District:

District	Total Population	% Deviation	Black Population	% Black
4	549,846	+ .63	116,530	21.19
5	542,592	− .70	319,822	57.28

[3] *See* note 1, *supra*.

App., 3a, ¶4.

In order to achieve a population within the allowable deviation, Act No. 5 added 122,118 persons to the Fifth District. Of these additional individuals, 99,188, or 81.22% of the total population added, were black citizens. Based on 1980 Census statistics, Act No. 5 increased the black proportion of the voting age population in the Fifth District from 48% to 52%. Act No. 5 removed no census tracts having a majority black population from the Fifth District and added 16 full census tracts having majority black populations to the Fifth District. Act No. 5 removed three full census tracts and one partial census tract, each having a white population over 95%, from the Fifth District.[4]

On September 22, 1981, the Governor of Georgia approved the enactment of Act No. 5. App., 2a, ¶3. The State's submission of Act No. 5 pursuant to Section 5 of the Voting Rights Act of 1965 was received by the Attorney General of the United States on September 29, 1981. By letter dated November 27, 1981, Appellee Reynolds requested additional information, which was provided to Reynolds on December 23, 1981.

By letter dated February 11, 1982, Appellee Reynolds, on behalf of Appellee Smith, interposed an objection to Act No. 5 based entirely on the line drawn between the Fourth and Fifth Congressional Districts. No objection was interposed to the remaining eight Congressional districts. In his February 11 objection letter, Reynolds stated that, inasmuch as Act No. 5 increased the black population of the Fifth Congressional District from 50.3% to 57.3% "under *Beer v. United States*, 425 U.S. 130 (1976),

---

[4] *See* note 1, *supra*.

the Plan must be considered one which 'enhances' the position of minorities in respect to their effective exercise of the election franchise and therefore cannot be said to have a racial 'effect' within the meaning of Section 5." Notwithstanding this admitted enhancement of black voting strength, Appellee Reynolds stated that he was unable to conclude that Act No. 5 did not have a discriminatory purpose with respect to the line drawn between the Fourth and Fifth Congressional Districts.

The State's request for reconsideration and withdrawal of the objection, pursuant to 28 C.F.R. § 51.44, was received by Appellee Reynolds on February 19, 1982. By letter dated March 3, 1982, Appellee Reynolds denied the request to withdraw the objection.

On March 8, 1982, Appellants filed this action for declaratory judgment and, on March 22, 1982, a group of black state legislators were granted permission to intervene as defendants. The trial was conducted on June 28-July 1, 1982.

On July 22, 1982, the three-judge District Court issued its decision on the merits. The District Court concluded that the reapportionment plan enhanced black voting strength and did not have a discriminatory effect under this Court's decision in *Beer v. United States*, 425 U.S. 130 (1976). App., 44a, ¶7. Nevertheless, the District Court held that the line between the Fourth and Fifth Congressional Districts was drawn with a discriminatory purpose based primarily upon the finding that the Chairman of the House Reapportionment Committee made "overt racial statements" and attempted to minimize the enhancement of black voting strength. *See* App., 47a, ¶19. The District Court made no finding that black residents of the Fifth Congressional District were adversely affect-

ed by or had less opportunity to exercise their elective franchise under Act No. 5; nor did the District Court conclude that Act No. 5 was unconstitutional. The District Court denied the State's request for relief and enjoined the State from implementing its Congressional redistricting plan as such plan affects Georgia's Fourth and Fifth Districts. Additionally, the State was ordered to submit an alternative apportionment plan of the Fourth and Fifth Districts for District Court approval by August 11, 1982.[5]

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. THE DISTRICT COURT'S HOLDING—THAT A REAPPORTIONMENT PLAN THAT DOES NOT HAVE A DISCRIMINATORY EFFECT, THAT ENHANCES BLACK VOTING STRENGTH, AND THAT DOES NOT DENY BLACKS ACCESS TO THE POLITICAL PROCESS CAN, NEVERTHELESS, VIOLATE SECTION 5 OF THE VOTING RIGHTS ACT—IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS

---

[5] Pursuant to the District Court's July 22, 1982 order, the State submitted and received court approval of a new apportionment of the Fourth and Fifth Districts. Although the order approving the new plan is not a subject of this appeal, the legislation enacting the new apportionment specifically states that it will become ineffective and will revert back to Act No. 5 upon a reversal of the District Court's decision by this Court. Therefore, the issues raised in this Jurisdictional Statement have not been mooted by the District Court's subsequent order approving a new provisional apportionment plan. A determination of the issues raised herein will decide which Congressional apportionment plan will be in effect in the State of Georgia for the balance of the current decade. *See, e.g., Beare v. Briscoe*, 498 F.2d 244, 245, n. 5 (5th Cir. 1974).

COURT'S DECISION IN *BEER V. UNITED STATES*, 425 U.S. 130 (1976).

The three-judge District Court concluded that Georgia's 1981 Congressional reapportionment plan as it affects the Fourth and Fifth Congressional Districts violates Section 5 of the Voting Rights Act of 1965 even though the plan enhances minority voting strength and has no discriminatory effect. Moreover, the District Court made no finding that black citizens in those districts are denied equal access to the political process. Indeed, the evidence clearly established that blacks living in the area encompassed by the Fifth District have enjoyed considerable influence in electing candidates of their choice. *See* pp. 19-22, *infra*.

The holding of the District Court is in direct and irreconcilable conflict with *Beer v. United States*, 425 U.S. 130 (1976) in which this Court explained the Section 5 test as follows:

> "When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that 'the standard [under § 5] can only be fully satisfied by determining on the basis of facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting . . . .' H. R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.
>
> "It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the elec-

> toral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 unless *the new apportionment itself* so discriminates on the basis of race or color as to violate the Constitution."

425 U.S. at 141 (footnote omitted; second emphasis added).

The District Court recognized that Georgia enhanced the black population in the Fifth District from 50.33% to 57.28% and that, therefore, there was "no retrogression" and the voting plan did "not have a discriminatory effect" under *Beer*. App., 44a, ¶7. In addition, the record is replete with evidence showing that no member of the Georgia General Assembly ever intended to reduce the black percentage of total population, of voting age population, or of registered voters below the percentage in the preexisting Fifth Congressional District. The lower court specifically found that Representative Joe Mack Wilson, the Chairman of the House Reapportionment Committee, whom the District Court characterized as a "racist," had no intent to create a new Fifth District which would reduce the proportion of black population below that found in the preexisting apportionment plan.[6]

[6] Although Appellants would dispute the District Court's findings that Representative Wilson is a "racist," it has been recognized by this Court that even though a particular individual may have been motivated by considerations which, if shared or adopted by the State, would result in an invalid act, that fact alone does not invalidate a collective act such as reapportionment. As Justice Stevens stated in his concurring opinion in *Washington v. Davis*, 426 U.S. 229, 253 (1976):

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compro-

App., 26a-27a, ¶77. Moreover, the District Court did not hold that "the *new apportionment itself* so di criminates on the basis of race or color as to violate the Constitution." *Beer v. United States, supra.* (Emphasis added.) Nevertheless, the lower court has become the first court ever to conclude that, in spite of the acknowledged enhancement of black voting strength, "Act No. 5 as it pertains to the Fourth and Fifth Congressional Districts has a discriminatory purpose in violation of Section 5." App., 47a, ¶19. No other case, either under Section 5, the Fourteenth Amendment, or, the Fifteenth Amendment, has reached such a result.

The underlying facts in the instant case are nearly identical to the facts in *Beer*. The electoral change at issue in *Beer* was the reapportionment of the City of New Orleans' councilmanic districts. The District Court found that the plan at issue had a discriminatory effect. *Beer v. United States*, 374 F.Supp. 363 (D.D.C. 1974). This Court reversed that decision.

In *Beer*, as in this case, the United States Attorney General objected to a redistricting plan because the predominantly black neighborhoods in New Orleans were located generally in an east-to-west progression and "the use of north-to-south districts in such a situation inevitably would have the effect of diluting the maximum potential of the Negro vote." *Beer v. United States*, 425 U.S. at 136. Justice Marshall noted in dissent that the inevi-

---

mise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decision maker *or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.*" (Emphasis added.)

table result of that plan's north-south orientation was to have districts in which blacks were generally in the minority or, at the most, in a bare majority. The District Court's opinion in the instant case follows the rationale of the lower court in *Beer* and Justice Marshall's dissent in *Beer*, 425 U.S. at 145-163. Justice Marshall noted that the black community in New Orleans was not widely dispersed, but rather was "collected in a concentrated curving band that runs roughly east-west" which was divided "like so many pieces of bologna" by the City's north-south apportionment plan. 425 U.S. at 161 (Marshall, J., dissenting). Similarly, the District Court below found that the black population in Fulton and DeKalb Counties is "concentrated in one contiguous area" which "separates the races in both counties on an east-west axis." App., 4a, ¶8. Justice Marshall, in *Beer*, found that none of New Orleans' proffered reasons for maintaining its councilmanic districts along a north-south axis was an acceptable justification for "diluting" the black vote, and noted that alternative plans that had been drawn with greater black percentages of population had been rejected, although they satisfied the City's principles of reapportionment. 425 U.S. at 162-163 (Marshall, J., dissenting). In the instant case, the District Court also rejected the State's proffered justifications for its reapportionment plan on the grounds that other options were available which could have created a Fifth District with an even higher black percentage of population. *See* App., 20a, ¶58; 38a, ¶110.

This Court held in *Beer* that an apportionment scheme which is non-retrogressive and enhances minority voting strength cannot violate Section 5 of the Voting Rights Act of 1965 unless the new apportionment so discriminates on the basis of race as to violate the Constitution.

In this case, as in *Beer*, there can be no rational contention that Act No. 5 suffers from any such constitutional infirmity.[7]

Act No. 5 "does not remotely approach a violation of the constitutional standards enunciated in those cases" in which this Court considered claims that legislative apportionments violated the constitutional rights of certain minorities. *Beer v. United States*, 425 U.S. at 142-143, n.14. For example, in *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971), this Court stated that proof of invidious discrimination violative of the Fourteenth Amendment in a redistricting context will result only where it is shown that a minority group will have less opportunity than other residents to participate in the legislative process and to elect legislators of their choice. *See also Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Burns v. Richardson*, 384 U.S. 73, 88-89 (1966); *White v. Register*, 412 U.S. 755, 766 (1973). In the instant case, a black was elected to Congress three times in the old Fifth District, and the new Fifth District is conceded to have enhanced black voting strength. In addition, during the past decade, blacks regularly offered their candidacies and were elected to offices in both Fulton County and the City of Atlanta, the areas generally encompassed by the old Fifth District and new Fifth District under Act No. 5. Thus, it is not possible to conclude that Act No. 5 cancels out black

---

[7] In *Beer*, this Court noted:

"It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional. The United States has made no claim that Plan II [the City's apportionment plan] suffers from any such disability, nor could it rationally do so."

425 U.S. at 142, n. 14 (bracketed matter supplied).

voting strength in violation of the Constitution. As is discussed in Section B, *infra*, the evidence in the case at bar not only negated any contention that blacks in Georgia's Fifth Congressional District have less of an opportunity to participate and to elect representatives of their choice, but established that Act No. 5 has absolutely no adverse impact upon black voting strength.

Therefore, the District Court's ruling obviously contradicts this Court's opinion in *Beer* and presents a question of great magnitude, the resolution of which by this Court will affect all political subdivisions covered by Section 5 of the Voting Rights Act.

B. THE DISTRICT COURT'S HOLDING—THAT A REAPPORTIONMENT PLAN THAT DOES NOT HAVE THE PURPOSE OF DIMINISHING THE EXISTING LEVEL OF BLACK VOTING STRENGTH CAN, NEVERTHELESS, HAVE THE PURPOSE OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT—IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THIS COURT'S DECISION IN *CITY OF RICHMOND V. UNITED STATES*, 422 U.S. 358 (1975).

The District Court has misconstrued *City of Richmond* v. *United States*, 422 U.S. 358 (1975), to invalidate the reapportionment of Georgia's Fourth and Fifth Congressional Districts. In *City of Richmond*, a three-judge District Court held that the city's annexation of approximately 23 miles of adjacent county land had the purpose and the effect of diluting the black vote, in violation of Section 5 of the Voting Rights Act. The pre-annexation population of the City was 52% black; the post-annexation population was 42% black. The record in the case

contained numerous statements by public officials that the predominant motive of the 1969 annexation was to acquire 44,000 additional white citizens for the City in order to avert a transfer of political control to what was fast becoming a black population majority. 422 U.S. at 382.

On appeal, this Court reversed. With respect to the issue of effect, this Court held that "an annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential." 422 U.S. at 378. This Court held that the post-annexation single-member district ward plan did so recognize the minority's political potential, satisfying the effect test of Section 5, even though the annexation did reduce the political strength enjoyed by blacks prior to the annexation, and even though the City had rejected another ward plan presented by intervenors that would have given blacks more political strength. "To hold otherwise," this Court stated, "would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area." 422 U.S. at 371.

With respect to the issue of discriminatory purpose, this Court in *City of Richmond* held that the case should be remanded to afford the City an opportunity to show "whether there are now objectively verifiable, legitimate reasons for the annexation," *i.e.*, reasons other than reducing the pre-annexation black majority population to

the post-annexation black minority population. 422 U.S. at 375. Because the annexation, by itself, was retrogressive, it could only be justified under the annexation exception if the purpose of the annexation was to satisfy legitimate municipal objectives, rather than to diminish black voting strength. If the purpose was to " 'despoil colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights*', *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)," the annexation would fail the purpose test of Section 5. 422 U.S. at 378 [emphasis added].

The *City of Richmond* case is inapplicable to the case at bar, not only because it is an annexation, rather than a reapportionment, case, but also because it predates *Beer*, wherein it was distinguished as follows:

> "The *City of Richmond* case thus decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5. *The present case, by contrast, involves a change with no such adverse impact upon the former voting power of Negroes.*"

Beer v. United States, 425 U.S. at 139, n. 11 [emphasis added].

Act No. 5 does not reduce the political strength of black voters in the proposed Fifth District relative to their political strength in the old Fifth District; moreover, the voting change does not have the purpose of "despoiling" blacks "of their theretofore enjoyed voting rights." *City of Richmond v. United States*, 422 U.S. at 378. Under this Court's standards in *Beer*, the only way that an ameliorative, nonretrogressive voting plan, such as the one enacted by the State of Georgia, can be declared void is if "the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." *Beer v. United States*, 425 U.S. at 141.

To prove that the apportionment effected by Act No. 5 continues to so discriminate on the basis of race or color as to violate the Constitution, evidence must be produced to support findings that the processes leading to the nomination and election in the Fifth Congressional District are "not equally open to participation [by blacks—that blacks have] less opportunity than do other residents [in the Fifth District] to participate in the political process and to elect [a Congressman] of their choice." [8] *White v. Register*, 412 U.S. 755, 766 (1973). *See also City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Whitcomb v. Chavis*, 403 U.S. 124, 149-150 (1971).

Here, as in *City of Richmond*, 422 U.S. at 377, there is "no indication" that the District Court gave "any attention to the . . . evidence in the record" (some of which was provided by the trial testimony of Appellee-Intervenors' own expert, Dr. Alex Willingham) that, since the legislative repeal of the poll tax on February 5, 1945 and the judicial repeal of the white primary on April 1, 1946, there have been no official barriers to black registration and voting in Fulton County, the City of Atlanta, and the Fifth Congressional District. In particular, no literacy tests were administered in the City of Atlanta, Fulton County, or the Fifth District to disenfranchise black voters in 1945-1965, the years preceding the passage of the Voting Rights Act of 1965.[9]

---

[8] As in *Beer v. United States*, 425 U.S. at 142, n. 14, neither the United States nor the intervenors made an allegation that Act No. 5 was unconstitutional in the proceedings below.

[9] Notwithstanding the testimony of Dr. Willingham and Dr. Bob Holmes, an intervenor, on the lack of official barriers to black voting in the Atlanta area in the years immediately prior to the passage of the Voting Rights Act of 1965, and the absence of any evidence in the record to indicate otherwise, the District Court erroneously discredited the entire trial testimony of Representative Grace Hamil-

Furthermore, the District Court ignored the undisputed fact that blacks have long enjoyed effective access to the political process in the City of Atlanta and surrounding area. Of the population of the new Fifth District as redrawn by Act No. 5, 76.7% resides in the City of Atlanta. According to Appellants' evidence at trial, Atlanta has offered an atypical picture of the role of blacks in southern politics. *See, e.g.*, Walker, *Negro Voting in Atlanta: 1953-1961*, 24 Atlanta U. Rev. (Phylon) 379 (1963); Hornsby, *The Negro in Atlanta Politics, 1961-1973*, Atlanta Hist. Soc'y Bull. (Spring 1977); Bacote, *The Negro in Atlanta Politics*, 16 Atlanta U. Rev. (Phylon) 333 (1955). Indeed, as testified to by Political Science Professor Bob Holmes, an intervenor in the instant case, black voter participation in the City of Atlanta is and has been higher than in most of the northern cities such as Chicago, higher than in southern cities such as Birmingham and New Orleans, and higher than in Georgia cities such as Albany, Macon, and Valdosta.

Finally, the District Court totally ignored the undisputed trial testimony of Appellants' experts, Drs. Charles Bullock and Everett Lee, which conclusively established not only that black residents of Georgia's Fifth Congressional District have had great access and influence in the political process, including electing candidates of their choice prior to the latest reapportionment, but also that such black citizens will have an even greater ability to elect a Congressman under the 1981 apportionment.[10] In

---

ton, a black legislator, because she stated that she "knew of no instances where black people had difficulty in registering or voting in the Atlanta area in the years just prior to" the passage of the Voting Rights Act. App., 8a, ¶18.

[10] Appellees failed to call their own expert, Dr. James Loewen, to rebut any of the election analysis and results given by Dr. Bullock at trial. Appellees' failure to call Dr. Loewen should have led the

fact, black citizens have been able to elect candidates of their choice in the Fifth Congressional District, as well as in Fulton County and the City of Atlanta (which make up the great majority of the Fifth District), over the past decade, even when the proportion of population of blacks in the area was much less than 50%. During 1972, 1974, and 1976, Andrew Young, a black candidate (and now Mayor of Atlanta), was elected Congressman from the Fifth District when the black percentage of population was below 50%, the black percentage of voting age population was well below 50%, and the black percentage of registered voters was below 40%. In 1977, 1978, and 1980, Wyche Fowler, a white, liberal Democratic candidate, was elected Congressman from the Fifth District with substantial black support. The extent of crossover voting in Atlanta area elections in 1970-1981 has shown great variation, negating any finding of racial bloc voting. The District Court's finding that racial "polarization" has increased since the time of Andrew Young's election to Congress in 1972, App., 5a, ¶10, is clearly erroneous. Mr. Young was reelected to that office in 1974 and 1976, receiving substantial white support. Moreover, white crossover voting for black candidates increased during the decade, as demonstrated by Dr. Bullock's ecological regression analysis.

Additionally, the undisputed testimony of Dr. Lee indicated that the black population of the Fifth District under Act No. 5 has already increased to nearly 60% of the total population, and will be well over that figure during the mid-1980's, accompanied by a substantial in-

---

District Court to give the strongest weight to Dr. Bullock's testimony, which Dr. Loewen was in a position to contradict or explain. *See, e.g., Mammoth Oil Co. v. United States*, 275 U.S. 13, 51-53 (1927), *De Gaster v. Dillon*, 247 F.Supp. 511, 516 (D.D.C. 1963).

crease in the black voting age population in the area. *See Beer v. United States*, 425 U.S. at 142, n. 13; *Taylor v. McKeithen*, 499 F.2d 893, 896 (5th Cir. 1974). These data establish that black citizens of the Fifth Congressional District will have even greater access to the political process and will enhance their ability to select a Congressman of their choice. It is also clear from the record that the incumbent white Congressman, Wyche Fowler, is responsive to the needs of his black constituents, who have supported him in his last reelection efforts in 1978 and 1980.

Therefore, as in *Beer v. United States*, it "could [not] rationally" be contended that the reapportionment at issue "so discriminates on the basis of race as to violate the Constitution." 425 U.S. at 141. Nor, under *City of Richmond*, could it be contended that the voting change has an adverse impact on previous black voting power. *City of Richmond* does not condemn Act No. 5, because there is not even a suggestion in the record of this case that Act No. 5 had the purpose of reducing the present level of black voting strength. Absent a purpose to diminish the existing level of black voting strength or to despoil theretofore enjoyed voting rights, Act No. 5 cannot have a discriminatory purpose within the meaning of Section 5. The decision of the District Court not only misapplies this Court's decision in *City of Richmond v. United States*, but ignores this Court's later holding in *Beer v. United States*.

II. THE DISTRICT COURT'S FINDING OF DISCRIMINATORY PURPOSE SHOULD BE SET ASIDE BOTH BECAUSE IT IS BASED UPON AN ERRONEOUS VIEW OF THE CONTROLLING LEGAL PRINCIPLES AND ALSO BECAUSE IT IS BASED UPON UNDERLYING FACTUAL FINDINGS THAT ARE CLEARLY ERRONEOUS.

Appellants have briefly touched upon several erroneous findings (and the absence of other critical findings) which were instrumental in the District Court's decision. We will not burden this Court with a lengthy recitation of each finding which will be disputed by Appellants if this appeal is entertained, but merely point out that the District Court's findings may be set aside because of the lower court's misapplication of the legal standards in this case.

Of course, Rule 52 of the Federal Rules of Civil Procedure broadly requires that findings of fact should not be set aside unless "clearly erroneous." But, as this Court has recently observed, the above-stated rule does not apply when a District Court's decision is based upon an erroneous legal conclusion. "[I]f a District Court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Pullman-Standard v. Swint*, ___ U.S. ___, 72 L.Ed.2d 66, 79 (1982).

This Court should, therefore, note probable jurisdiction to conduct a further review of the District Court's findings, given the lower court's misapplication of this Court's legal standards.

III. THE ISSUES PRESENTED ARE SUBSTANTIAL.

The District Court's legal theory that a State's reappor-

tionment plan which enhances minority voting strength, has no discriminatory effect, and does not deny minority voters access to the political process can, nevertheless, violate Section 5 of the Voting Rights Act of 1965, is not only at odds with this Court's previous decisions in Section 5 cases, but leaves other states enacting future reapportionments in a quandry. On the one hand, the District Court correctly indicates that, in order to pass the "effect" test of Section 5, an apportionment plan need not enhance or maximize black voting strength, as long as such plan does not diminish black voting strength. On the other hand, in order to pass the "purpose" test under the lower court's view, a legislature must not compromise by selecting a plan which does not sufficiently enhance black voting strength. To state that a legislature need not enhance minority voting strength under the effect analysis but cannot minimize such enhancement under the purpose analysis ignores logic, and introduces arbitrary, capricious, and unfathomable standards of conduct into the reapportionment process. Under the District Court's theory, the only legislative approach that could be taken so as to confidently avoid a court's disapproval of its reapportionment plan would be the adoption of a plan which maximizes black voting strength, even though such effect is not required by Section 5 or the Constitution. *See Beer v. United States*, 425 U.S. at 136-137, n. 8; *Whitcomb v. Chavis*, 403 U.S. at 149; *Mississippi v. United States*, 490 F.Supp. 569, 582 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

In the instant case, both the history of successful black candidacies and the statistical analysis reveal that voting in the area encompassed by the Fifth District is not strictly along racial lines and that white crossover voting is often substantial. Moreover, elected representatives

are responsive to the needs of the black community, blacks are not hampered in obtaining access to the polls, and blacks are not denied effective participation in the political or economic life of the city. *Cf. Rogers v. Lodge*, ___ U.S. ___, 73 L.Ed.2d 1012 (1982).

The Georgia General Assembly enacted a Congressional reapportionment plan which increased the black percentage of population from 50.3% to 57.3% in a district in which a black had been elected three times with a majority white population. Moreover, the black percentage of voting age population was increased from 48% to 52%. That the Georgia legislature failed to provide for a district containing an even higher concentration of black voters should not invalidate the reapportionment scheme under the Voting Rights Act. Reapportionment brings into play a variety of competing considerations—ethnic, racial, political, economic, and otherwise. Compromise is the essence of the process. The District Court's decision stands for the proposition that a 57% black district is not sufficient where the legislature could have chosen, and rejected, a plan which would have created the maximum possible concentration of black electorate. The District Court found a discriminatory purpose from this "conscious minimizing of black voting strength." This Court has indicated that while redistricting bodies may properly take racial factors into account, *United Jewish Organizations v. Carey*, 430 U.S. 144, 165-168 (1977), they are not obliged to maximize the concentration of any racial group. *Beer v. United States*, 425 U.S. at 136-137, n. 8. If every such group were entitled to a majority district whenever one could theoretically be created, we would be well on the way to a theory of proportional representation which has been repeatedly rejected by this Court. *City of Mobile v. Bolden, supra.*

The impact of the District Court's decision is far-reaching. Anytime a State legislature enacts an ameliorative apportionment plan and, in doing so, fails to enact an alternative plan which would have further enhanced minority voting strength, that State will be hard-pressed to justify its "minimization" of the minority population percentage under the lower court's rationale. The Federal courts will, therefore, have to become "super-legislatures" by sorting through various alternative apportionment plans to ascertain whether the legislature knowingly rejected an option which would have created a greater minority district. State legislatures may well choose to "pack" minority residents into one district in order to create a maximum level of voter influence, which will necessarily lead to a dilution of minority strength in neighboring districts.[11] *See Mississippi v. United States*, 490 F.Supp. at 578. This will, in effect, lead to a decrease in the effective exercise of the election franchise by the particular minority group.

Thus, due to the irreconcilable conflict with decisions of this Court, the unfathomable legal standards set up for State legislatures to follow, and the erroneous factual findings made by the lower court, this Court should review the opinion and order of the three-judge District Court in the instant case.

---

[11] Indeed, although the District Court wrote favorably about the Congressional plan passed by the Georgia Senate as it affected the Fifth District, that plan, in fact, substantially diluted minority voting strength in the neighboring Fourth District; whereas, under Act No. 5, blacks were assured of substantial influence in the political process in both districts. *See* pp. 6-7, *supra*.

CONCLUSION

For the reasons stated above, we respectfully submit that this Court should note probable jurisdiction to review the opinion and order of the three-judge District Court for the District of Columbia.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS II
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

CAROL ATHA COSGROVE
Senior Assistant
Attorney General

MARK H. COHEN
Assistant Attorney General

JOSEPH W. DORN
Special Assistant
Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

CAROL ATHA COSGROVE
Senior Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3336